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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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COURT OF CRIMINAL APPEALS
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RUBEN LEE ALLEN
Appellant
v.

THE STATE OF TEXAS
Appellee

On Petition for Discretionary Review from
Appeal No. 01-16-00768-CR
in the Court of Appeals, First District at Houston

Trial Court Cause No. 1487627
337th District Court of Harris County, Texas
Hon. Renee Magee, Judge Presiding

APPELLANT'S BRIEF ON THE MERITS REGARDING STATE'S CROSS-PETITION FOR DISCRETIONARY REVIEW

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ORAL ARGUMENT NOT REQUESTED

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PRESIDING JUDGE:	Hon. Renee Magee 337th District Court Harris County, Texas 201 Caroline, 11th Floor Houston, Texas 77002

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STATEMENT OF THE CASE

On December 16, 2015, a Harris County grand jury returned an indictment charging the Appellant with the felony offense of aggravated robbery with a deadly weapon alleged to have occurred on or about September 11, 2015. (1 C.R. at 22). On September 15, 2016, a jury found the Appellant guilty of the offense of aggravated robbery. (1 C.R. at 125-126; 5 R.R. at 35). On September 16, 2016, the jury assessed Appellant's punishment at 25 years' confinement in the Texas Department of Criminal Justice – Institutional Division. (1 C.R. at 125-126; 7 R.R. at 186). No motion for new trial was filed. Appellant timely filed his notice of appeal on September 20, 2016 and the trial court certified the Appellant's right to appeal. (1 C.R. at 128-131).

On direct appeal, the First Court of Appeals initially affirmed the judgment of the trial court, but held TEX. CODE OF CRIM. PROC. ART. 102.011(a)(3) and (b) violated the State Constitution's Separation of Powers clause and modified the judgment to delete the $200.00 court cost for "summoning witness/mileage" assessed against the Appellant. *Allen v. State*, No. 01-16-00768-CR, 2017 Tex. App. LEXIS 11015 (Tex. App.—Houston [1st Dist.] Nov. 28, 2017). The State then filed a timely motion for *en banc* reconsideration on December 7, 2017. The panel withdrew their initial opinion on June 12, 2018, and issued a new, published opinion on August 30, 2018, affirming the judgment of the trial court, rejecting Appellant's constitutional challenge to the summoning witness/mileage fee. *Allen v. State*, No. 01-16-00768-CR, 2018 Tex. App.

LEXIS 7216 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018, pet. granted) (op. on reh'g) (designated for publication). Justice Jennings authored a published dissent. *Id.* at *25 (Jennings, J., dissenting). On December 12, 2018, this Court granted the Appellant's petition for discretionary review, as well as the State's cross-petition for discretionary review.

STATEMENT REGARDING ORAL ARGUMENT

This Court has ordered that oral argument will not be permitted in this case.

RESPONSE TO STATE'S GROUND FOR REVIEW

This Court should reject the State's invitation to overrule this Court's decisions in *Carson*, *Peraza*, and *Salinas*.

STATEMENT OF FACTS

The facts surrounding Appellant's conviction are not relevant to the issue that the State has raised in its cross-petition for discretionary review. On September 18, 2016, the trial court found the Appellant indigent and appointed him counsel for purposes of his appeal. (1 C.R. at 129-131). The cost bill, filed on September 23, 2016, eight days after the judgment was filed, assessed $200 for a "Summoning Witness/Mileage" Fee. (1 C.R. at 127, 142-182).

SUMMARY OF THE ARGUMENT

The Separation of Powers clause contemplates a zone of power for each department that must be kept free of usurpation or undue influence by each other department. This Court has recognized that the Separation of Powers clause may be

violated in either of two ways: (1) when one branch of government assumes or is delegated a power "more properly attached" to another branch, or (2) when one branch unduly interferes with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers. This is a consistent interpretation by either this Court or the Texas Supreme Court since the ratification of the first Texas Constitution in 1845. Although this Court has rejected the requirement that a court cost must be "necessary" or "incidental" to the trial of a criminal case, the belief that if court costs were collected by the judiciary were not directed to a legitimate criminal justice purpose and the concerns expressed by this Court of what could happen with those types of court costs remain true today. Based upon this, the holdings in *Peraza* and *Salinas*, and to an extent the holding in *Carson*, are consistent with the "belief on the part of those who drafted and adopted our state constitution that one of the greatest threats to liberty is the accumulation of excessive power in a single branch of government." Thus, this Court should reject the State's request to overrule this Court's decisions in *Carson*, *Peraza*, and *Salinas*.

Furthermore, the State's proposed rule would use court costs to raise money to fund items that are not for a legitimate criminal justice purpose, such as potholes, and would open the floodgates as to what the Legislature could come up with for criminal defendants to fund under the guise of paying "court costs." This is the concern that this Court and other State courts have expressed and would come to fruition under the State's proposed rule. Whether or not the Judiciary makes a "profit" is not the issue in

determining whether the Judiciary becomes a "tax gatherer" in violation of the Separation of Powers clause. A court cost becomes a tax when it is collected under the guise of being a reimbursement for the expenses of a criminal prosecution, but directed to fund programs that have nothing to do with the criminal justice system with such money solely being used to raise revenue. Thus, this Court should reject the State's proposed rule regarding court costs.

ARGUMENT

This Court should reject the State's invitation to overrule this Court's decisions in *Carson*, *Peraza*, and *Salinas*.

A. A violation of the Separation Powers Clause of the Texas Constitution has been consistently interpreted by both this Court and the Texas Supreme Court as occurring when one branch of government assumes, or is delegated, to whatever degree, a power that is more properly attached to another branch or when one branch unduly interferes with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers.

"The State believes this Court's recent focus on where court-costs are directed is not consistent with the original understanding of the Texas constitution." (State's Brief at 12). Thus, the State asks this Court to "overrule its current line of court-cost cases and revert to the original understanding of the Texas constitution[,]" in which according to the State, "the government was allowed to recoup the amount it had spent on the trial, and there were no restrictions on how that money would be spent." (State's Brief at 12). In support of their contention, the crux of the State's argument focuses on statutory provisions that were in effect that allowed court costs to be imposed upon a

convicted criminal defendant that essentially forced the defendant to pay for the costs of a criminal trial and that the money collected was never directed to a specific fund. (State's Brief at 30-41). Appellant contends that the State's analysis fails to take into consideration that the Separation of Powers clause of the Texas Constitution has been consistently interpreted by both this Court and the Texas Supreme Court. Appellant further contends that this consistent interpretation primarily supports this Court's decisions in *Peraza* and *Salinas* and to an extent this Court's decision in *Carson*.

"The Constitution is the fundamental law containing the principles on which the state government rests, regulating the three branches of government, and directing how each department shall exercise its powers." *Faulder v. State*, 612 S.W.2d 512, 520 (Tex. Crim. App. 1980) (Onion, P.J., dissenting), quoting *Texas National Guard Armory Board v. McCraw*, 132 Tex. 613, 126 S.W.2d 627 (Tex. 1939). "So important is this division of governmental power that it was provided for in the First Section of the First Article of the Republic of Texas, and alone it constituted Article 2 of each succeeding Constitution." *Langever v. Miller*, 124 Tex. 80, 76 S.W.2d 1025 (Tex. 1934). "The guiding principle of construing a constitution is to ascertain and give effect to the intent of the voters who adopted it." *Satterfield v. Crown Cork & Seal Co.*, 268 S.W.3d. 190, 201 (Tex. App.—Austin 2008, no pet.), citing *Williams v. Castelman*, 112 Tex. 193, 247 S.W. 263, 265 (Tex. 1922) and *Cox v. Robison*, 105 Tex. 426, 150 S.W. 1149, 1151 (Tex. 1912). "When interpreting our state Constitution, we rely heavily on its literal text…and are to

give effect to its plain language." *Republican Party v. Dietz*, 940 S.W.2d 86, 89 (Tex. 1997).[1] "The provisions of the Texas Constitution mean what they meant when they were promulgated and adopted, 'and it does not lie within the power of the Legislature to change their meaning, or to enact laws in conflict therewith.'" *Satterfield*, 268 S.W.3d at 201. See also *Keller v. State*, 87 S.W. 669 (Tex. Crim. App. 1905). "[W]here the language of the Constitution is express, commanding or prohibiting anything, such express language would settle the question; there would be no room for construction." *Ex parte Anderson*, 46 Tex. Crim. 372, 81 S.W. 973, 974 (Tex. Crim. App. 1904). See also *Chase v. Swayne*, 88 Tex. 218, 30 S.W. 1049, 1052 (Tex. 1895) ("There is a marked distinction between liberal construction of Constitutions and statutes, by which courts, from the language used, the subject matter and purposes of those framing them, find out their true meaning, and the act of a court in engrafting upon a law or Constitution something that has been omitted, which the court believes ought to have embraced. The former is a legitimate and recognized rule of construction, while the latter is *judicial legislation*,

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[1] As the Texas Supreme Court has stated:

> [W]e consider 'the intent of the people who adopted it. In determining that intent, the history of the times out of which it grew and to which it may be rationally supposed to have direct relationship, the evils intended to be remedied and the good to be accomplished, are proper subjects of inquiry. However, because of the difficulties inherent in determining the intent of voters over a century ago, we rely heavily on the literal text. We seek its meaning with the understanding that the Constitution was ratified to function as an organic document to govern society and institutions as they evolve through time.

Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 394 (Tex. 1989) (citations and quotations omitted).

forbidden by article 2, section 1, of the Constitution of the State.). The words of the Constitution "are mandatory." *Id.* "In the construction of a Constitution, it is to be presumed that the language in which it is written was carefully selected and made to express the will of the people, and that in adopting it they intended to give effect to every one of its provisions." *Mellinger v. City of Houston*, 68 Tex. 37, 3 S.W. 249, 252 (Tex. 1887).

Article II, Section 1, of the Texas Constitution provides:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. ART. II., § 1.[2]

This Court has "recognized that the Separation of Powers Clause may be violated in either of two ways:"

> First, it is violated when one branch of government assumes, or is delegated, to whatever degree, a power that is more properly attached to another branch. When a branch of government violates separation of powers in this way, it is said to have usurped another branch's power. The provision is also violated when one branch unduly interferes with another branch so that the other branch cannot effectively exercise its

[2] As the State points out, "[t]his provision has appeared in the same location of every Texas constitution since statehood, remaining unchanged since 1845." (State's Brief at 30). The Constitution of the Republic of Texas ratified in 1836 contained a Separation of Powers clause, but the clause was located in Article I, Section 1 and provided "The powers of this Government shall be divided into three departments, viz: Legislative, Executive and Judicial, which shall remain forever separate and distinct."

> constitutionally assigned powers. This undue influence test takes the middle ground between those who would seek rigid compartmentalization and those who would find no separation of powers violation until one branch completely disrupted another branch's ability to function.

Vandyke v. State, 538 S.W.3d 561, 571 (Tex. Crim. App. 2017) (internal citations and quotations omitted).

A review of case law demonstrates this to be a consistent interpretation by either this Court or the Texas Supreme Court since the ratification of the first Texas Constitution in 1845.

In 1907, the Texas Supreme Court examined the constitutionality of the "Intangible Assets Act." See *Missouri, K. & T.R. Co. v. Shannon*, 100 Tex. 379, 100 S.W. 138 (Tex. 1907). This act setup a tax board consisting of the Secretary of State, the Comptroller, and the Tax Commissioner. *Id.* at 139.[3] The railroad company sought to enjoy the board "from taking any action under the act." *Id.* One of the contentions advanced by the railroad was that "[t]he State Tax Board as constituted and organized by the Intangible Assets Act is an illegal body, in that said Act attempts to confer upon the Secretary of State and the Comptroller of Public Accounts, each of whom is an executive officer, powers that are not executive and compels the exercise by them of powers which are not executive but are legislative and judicial in their nature, in violation of section 1, article 2, of the Constitution of the State of Texas." *Id.* at 140.

[3] This act "provide[d] for a State Tax Board to ascertain the true value of the intangible assets of a railway company for taxation, and to apportion such values for taxation to the various counties through which the lines of the railroad run." *Texas & P.R. Co. v. El Paso*, 126 Tex. 86, 92, 85 S.W.2d 245, 247 (Tex. 1935).

The Texas Supreme Court determined that the Intangible Assets Act did not violate the Separation of Powers clause of the Texas Constitution. *Id.* at 140-141. In making this determination, the Court first noted that "Section 21 of article 4 of our Constitution defines some of the duties of the Secretary of State, but also provides that he shall 'perform such other duties as may be required by law.'" *Id.* at 140. In determining that the State Tax Board was not unconstitutionally delegated a judicial function, the Supreme Court determined:

> [W]e are not prepared to hold that the Legislature has the power to devolve upon the Secretary of State and the Comptroller either judicial or legislative functions. It is very clear to our minds that the Act in question does not attempt to confer upon the Tax Board any legislative powers, nor do we understand that such a construction is claimed for it. But it is urged that their powers are judicial in their nature, and that therefore the Act is void. We think the argument is based upon a confusion as to the meaning of the word "judicial." Article 5 of our Constitution provides for the organization of the judicial department of the government. It prescribes what courts shall be established and defines their jurisdiction; names the officers of courts and prescribes their powers; and in every instance save one the province of the courts so provided for is to hear and determine causes between parties affecting the rights of persons as to their life, liberty and property. The exception is the Commissioners' Courts, which are not properly a part of the judicial department. But the whole scope of the article shows clearly what is meant by the judicial department of the government. The word "judicial" is, however, used, not with strict accuracy in another sense. It is applied to the act of an executive officer who in the exercise of his functions is required to pass upon facts and to determine his action by the facts found. This is sometimes called a quasijudicial function.

Id. at 141.

Thus, the Texas Supreme Court determined that the State Tax Board determinations were still an exercise of executive power by an executive agency and was

not an exercise of judicial power as expressed by Article V, Section 1 of the Texas Constitution.

In 1912, this Court addressed the issues of whether "the Legislature [has] the authority to confer upon district judges the authority to suspend a sentence after a person has been legally convicted of crime, and has the Legislature the authority to confer on district judges the power to extend immunity from punishment" as detailed in the statute at issue in the case. *Snodgrass v. State*, 67 Tex. Crim. 615, 150 S.W. 162, 165 (Tex. Crim. App. 1912). The law at issue "not only gav[e] to district judges discretionary power to suspend the sentence of a person after he has been legally convicted of an offense, but also after lapse of time upon a showing that he has been guilty of no other offense, to set aside the judgment of conviction, thus in terms conferring on them the power to grant pardons to person convicted of crime." *Id.* This Court ultimately determined that the legislature could not bestow the power to grant an unconditional pardon on another officer, other than the governor:

> That the Legislature has the power being the representative of sovereignty, to confer this power on the courts can not be questioned, unless inhibited by the provisions of the Constitution. It specifically confers upon the Governor the authority to pardon, reprieve and grant commutations of punishment…A pardon, however, is held to be an act of grace proceeding from the power entrusted with the execution of the laws which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime which he has committed. This Act by its provisions provides that after a person has been legally convicted of a crime, and his sentence suspended under the provisions thereof, upon the expiration of double the time assessed as punishment by the jury, the defendant may apply to the court to have the judgment of conviction set aside, and if it appears that he has not been convicted of *any other*

> *offense,* the judgment of conviction shall be set aside and annulled, thus giving to the District Courts the power and authority to exempt from punishment a person legally convicted of crime, and of which he has been adjudged guilty, and to which our laws affix a penalty. By the act of setting the judgment aside such person would also be restored to all the rights and privileges to which one is entitled who has never been convicted of an offense. In other words, this Act of the Legislature grants to such a person an unconditional pardon, although the word "pardon" is not used therein, and this necessarily includes the question, can the Legislature bestow upon any officer, other than the Governor, the power to grant an unconditional pardon? We have carefully examined the decisions in those states having constitutional provisions similar to our own, and it seems that an unbroken line of decisions hold that the power can not be granted to any other person or agency, where the Constitution of the State confers the power on the Governor.

Snodgrass, 150 S.W. at 164-165.[4]

In other words, this Court determined that the Separation of Powers clause was violated when the Legislature gave to the judiciary the power to grant an unconditional pardon, a power that is more properly attached to the executive branch. See also *Ex parte Rice*, 72 Tex. Crim. 587, 162 S.W. 891 (Tex. Crim. App. 1913) ("It is a maxim of constitutional law that no one of the three great departments of the government shall intrude upon any one of the others, and all attempts to do so are void." This Court determined that the Governor had the power to grant a conditional pardon, but it could only be revoked upon a violation of the conditions) and *Easterwood v. State*, 34 Tex. Crim. 400, 31 S.W. 294, 296 (Tex. Crim. App. 1895) ("Disabilities arising out of an

[4] After this Court's decision, the Legislature enacted a new suspended sentence law that was determined to not conflict with the Governor's pardoning powers. See *Baker v. State*, 70 Tex. Crim. 618, 158 S.W. 998 (1913). The Texas Constitution was amended in 1935 to allow for the creation of community supervision in Texas. See TEX. CONST. ART. IV, § 11.

attaching to a conviction for felony in this State are removed by the absolute pardon. The provisions in the Constitution and the laws of this State, imposing disabilities because of conviction, are not and can not be limitations upon the authority of the Governor to pardon. It is beyond the power of the Legislature to so restrict the consequences of the pardon. His power is supreme, and beyond the reach of legislative limitations").

In *Rochelle v. Lane*, the Texas Supreme Court issued a mandamus against the Comptroller of the State of Texas and ordered him to pay the Sheriff of Bowie County for costs associated with felony cases tried in November of 1910. *Rochelle v. Lane*, 105 Tex. 350, 148 S.W. 558 (Tex. 1912). The Sheriff had complied with the applicable provisions of the Code of Criminal Procedure by providing a statement of facts that would allow a judge to authorize an approval. *Id.* at 569. The Court indicated that "[t]he examination of these accounts was performed by a court of competent jurisdiction at a regular session and in a proceeding prescribed by statue, upon evidence furnished by the sheriff and a decision made upon the issues raised; a judgment was regularly entered upon the minutes during a regular term of court." *Id.* The Court characterized this as fulfilling "the most rigid definition of a judicial act." *Id.* After approval by the judge, the judgment was forwarded to Comptroller and "it shall be the duty of the comptroller upon the receipt of such claim and certified copy of the minutes of the said court to closely and carefully examine the same and if correct to draw his warrant." *Id.* The Comptroller claimed that the he could "determine upon the justice of the different

items and reject or approve them" *Id.* The Texas Supreme Court rejected the Comptroller's contention:

> If the Legislature intended to confer such power upon the comptroller it would have violated Section 1 of Article II of the Constitution…The comptroller is an executive officer and cannot exercise judicial power. The judgment being a judicial act cannot be reviewed by an executive officer.

Rochelle, 148 S.W. at 560.

In 1966, the Texas Supreme Court addressed whether a provision of the Texas Savings and Loan Act, which provided for judicial review from the denial of a bank's application for a charter by the Savings and Loan Commission of Texas. *Gerst v. Nixon*, 411 S.W.2d 350 (Tex. 1966). In granting judicial review of the denial of an application of a charter, the statute "require[d] a redetermination by the trial court of the fact issues material to the validity of the commissioner's order upon a preponderance of the evidence basis." *Id.* at 352. In *Gerst*, the Savings and Loan Commission of Texas appealed the judgment of the trial court that determined that the commission's negative finding in denying the bank charter were not reasonably supported by the evidence. *Id.* at 352. The Texas Supreme Court held that "[t]he provision for judicial review which purports to vest a court with the power to redetermine upon a preponderance of the evidence basis the issues…[was] unconstitutional" in violation of the Separation of Power clause:

> The granting of withholding of a permit, certificate or authority to do business in a statutorily regulated commercial endeavor is an administrative function and under the [Separation of Power Clause], such function cannot be delegation to the judiciary. The judicial inquiry in

> regards to such matters is restricted to the method employed by the administrative agency in arriving at its decision.

Id. at 354.

In 1990, this Court addressed the issue of whether a statute that provided "[a] final judgment may be entered against a bond not earlier than…18 months after the date the forfeiture was entered, if the offense for which the bond was given is a felony" violated the Separation of Powers clause because it unduly interfered 'with the courts' exercise of 'judicial' power." *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 238-239 (Tex. Crim. App. 1990). Although this Court acknowledged, "it is no simple task to determine whether any given legislative action that affects the exercise of judicial power is a violation of the separation of powers provisions," this Court determined:

> Article 22.16(c)(2) requires that the Judiciary refrain from exercising a part of its core power for a period of a year and a half. If this requirement is, as Armadillo argues, a valid exercise of the Legislature's power over judicial administration, then, as the court of appeals noted, nothing prevents the legislature from imposing an *interminable* delay in obtaining final judgment. In other words, if Article 22.16(c)(2) is valid, then the Legislature has the power to render the Judiciary impotent with respect to the entry of final judgments.
>
> [T]he Legislature may not unduly interfere with the judicial function under the guise of establishing rules of court…the separation of powers principle necessarily contemplates a zone of judicial power which must be free of legislative interference. The question in each case is whether the legislation in issue is grounded on the Legislature's own constitutionally assigned power and, if so, whether the legislation nevertheless unduly interferes, or threatens to unduly interfere, with the Judiciary's effective exercise of *its* constitutionally assigned power, and we so hold.
>
> In our view, Article 22.16(c)(2) unduly interferes with the Judiciary's effective exercise of its constitutionally assigned power. We hold,

> therefore, that the statute is invalid under Article 2, §1 of the Texas Constitution.

Armadillo, 802 S.W.2d at 241.[5]

In *Ex parte Lo*, this Court held that a statute setting forth requirements for notice to the attorney general regarding challenges to the constitutionality of a statue and a provision suspending a judgment until 45 days after notice had been provided, violated the Separation of Powers clause as an undue interference. *Ex parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2014) (op. on reh'g). In arriving at this determination, this Court stated:

> There are spheres of activity so fundamental and so necessary to a court, so inherent in its very nature as a court, that to divest it of its absolute command within these spheres is to make meaningless the very phrase judicial power. Requiring that the court refrain from entering a final judgment for a year and a half in a felony case and for nine months in a misdemeanor case, was such a divestiture…[T]he potential length of the delay is not so much the problem as the fact of the attempted interference at all. Entering a final judgment is a core judicial power; it falls within that realm of judicial proceedings so vital to the efficient functioning of a court as to be beyond legislative power. Thus, the 45-day time frame provided for in subsection (b) is a constitutionally intolerable imposition on a court's power to enter a final judgment and a violation of separation of powers.

Ex parte Lo, 424 S.W.3d at 29.[6]

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[5] Applying *Armadillo*, this Court held a different subsection of the same act that applied to misdemeanors violated the Separation of Powers clause. See *State v. Matyastik*, 811 S.W.2d 102 (Tex. Crim. App. 1991).

[6] This Court also noted "that subsection (a), standing alone, violates the separation of powers because it attempts to impose a duty that falls outside of and is unrelated to any judicial functions and powers of this Court." *Ex parte Lo*, 424 S.W.3d at 30, fn. 3.

Finally, in *Vandyke,* at issue was an amendment to Chapter 841 of the Texas Health and Safety Code that "removed a provision that made it a criminal offense for a sexually violent predator who had been civilly committed to fail to comply with the terms of his sex offender treatment." *Vandyke*, 538 S.W.3d at 565. "Furthermore, the Legislature included a savings clause…that made the legislation apply to anyone who had been convicted of the offense of violating the terms of civil commitment and whose direct appeal of that criminal matter was pending at the time the legislation became effective." *Id.* Appellant's conviction had not yet become final when the legislation was signed as his direct appeal was still pending. *Id.* After examining the character and effect of a pardon and of a legislative repeal, this Court determined:

> The Legislature usurps another branch's power when it assumes, or is delegated, to whatever degree, a power that is more "properly attached" to another branch. Repealing laws and decriminalizing conduct has always been part of the Legislature's delegated power. The Legislature has not assumed the power to grant clemency because decriminalizing conduct through the use of legislative amendments is not and has never been part of the executive's discretionary authority to forgive the legal consequences flowing from a conviction.

Vandyke, 538 S.W.3d at 582.

This Court also considered "the impact of the amendments on the Executive's exercise of its constitutionally assigned power":

> The amended version of Section 841 of the Health and Safety Code, and its savings clause, affects the validity of certain convictions obtained under Section 841.085 of the Health and Safety Code. It does not prevent the governor from granting clemency to those prosecuted under Section 841.085 whose convictions remain valid. In particular, it does not prevent the governor from granting clemency to individuals whose convictions

> have already become final under the previous law. In short, the Legislature has not prevented the Executive branch from effectively exercising its power to grant clemency in general, nor with regard to sexually violent predators convicted under Section 841 of the Health and Safety Code. Therefore, the statute does not unduly interfere with the Executive's power to grant clemency.

Id. at 582.

Ultimately, this Court held that "[t]he Legislature does not violate separation of powers when it validly exercised its power to repeal criminal laws and does so without granting clemency power to the courts." *Id.*

What these cases demonstrate is that the Separation of Powers clause contemplates a zone of power for each department that must be kept free of usurpation or undue influence by each other department. The cases cited to by the Appellant provide examples of how the lines of protectiveness run: the executive branch is protected from the judicial; the judicial branch is protected from the executive; the legislative branch is protected from the judicial; the judicial branch is protected from the legislative; the executive branch is protected from the legislative, and the legislature is protected from the executive branch. This is the consistent theme throughout Texas Jurisprudence in interpreting the Separation of Powers clause of the Texas Constitution. See *Langever*, 76 S.W.2d at 1035. ("Under this division of governmental power it is now an established and fundamental principal of constitutional law that the Executive can not exercise either Judicial or Legislative authority; the Judicial Department can not be

clothed with Executive or Legislative power; and the Legislative 'magistracy' can not exercise the functions of either the Executive or the Judicial Departments.").

B. The consistent interpretation of the Separation of Powers clause in Texas Jurisprudence supports this Court's decisions in *Peraza* and *Salinas*, and to an extent, *Carson*.

The Separation of Powers clause "is violated when one branch of government assumes, or is delegated, to whatever degree, a power that is more properly attached to another branch. When a branch of government violates separation of powers in this way, it is said to have usurped another branch's power." *Vandyke*, 538 S.W.3d at 571. "Although one department has occasionally exercised a power that would otherwise seem to fit within the power of another department, our courts have only approved those actions when authorized b an express provision of the Constitution." *Meshell v. State*, 739 S.W.2d 246, 252 (Tex. Crim. App. 1987), citing *Government Services Ins. Underwriters v. Jones*, 368 S.W.2d 560 (Tex. 1963).

Carson's requirement that court costs be "necessary" or "incidental" to "the trial of a criminal case" was the standard for 73 years. "In *Carson*, this Court considered whether it was constitutionally permissible to impose a $1 fee as a court cost in all cases filed in counties with more than eight district courts and more than three county courts, including county courts at law." *Peraza v. State*, 467 S.W.3d 508, 513 (Tex. Crim. App. 2015), citing *Ex parte Carson*, 159 S.W.2d 126, 127 (Tex. Crim. App. 1942). "The revenue collected from the $1 fee was directed to the 'County Law Library Fund' and 'available to be used for certain costs and expenses in acquiring, maintaining and operating a law

library available to the judges of the courts and to the attorneys of litigants in the courts.'" *Id.* This Court in *Carson* struck down the fee, clarifying on rehearing "that the item of one dollar taxed as costs for the Law Library Fund is neither necessary nor incidental to the trial of a criminal case, and that is not a legitimate item to be so taxed." *Id.* at 130. Although this Court in *Carson* did explicitly cite to or hold that the challenged court cost violated the Separation of Power clause, the Court did call the court cost a "tax" and stated that they could not view "that the cost may be taxed as a proper item because the money is used in the establishment and maintenance of a law library which, it is stated, is a legitimate charge on the litigants." *Id.* at 127. This Court further explained:

> Such reasoning would lead into fields of expenditures which may as well include the cost of the court houses, the automobiles which officers use to apprehend criminals and even the roads upon which they ride. If something so remote as a law library may be properly charged to the litigant on the theory that it better prepares the courts and the attorneys for the performance of their duties, it occurs to us that we might as logically tax an item of cost for the education of such attorneys and judges and even the endowments of the schools which they attend. Many other illustrations might be used appropriately to show the fallacy of such contention and the inevitable results that litigation in the courts would be prohibitive. We, therefore, conclude, as several states have, that the tax imposed by the bill is not and cannot be logically considered a proper item of cost in litigation, particularly in criminal cases.

Id.

Although this Court has rejected the requirement that a court cost must be "necessary" or "incidental" to the trial of a criminal case, the belief that if court costs were collected by the judiciary were not for a legitimate criminal justice purpose and the

concerns expressed by this Court that these types of court costs becoming a method raising revenue remain true today. This theme is further expressed in this Court's decisions in *Peraza* and *Salinas*.

This Court's decision in *Peraza* rejected the requirement "that, in order to pass constitutional muster, the statutorily prescribed court cost must be 'necessary' or 'incidental' to the 'trial of a criminal case'" under this Court's prior precedent in *Carson*. *Peraza*, 467 S.W.3d at 517. *Peraza* held:

> if the statute under which court costs are assessed (or an interconnected statute) provides for an allocation of such court costs to be expended for legitimate criminal justice purposes, then the statute allows for a constitutional application that will not render the courts tax gathers in violation of the separation of powers clause. A criminal justice purpose is one that relates to the administration of our criminal justice system. Whether a criminal justice purpose is "legitimate" is a question to be answered on a statute-by-statute/case-by-case basis.

Id. at 517-518.

In discussing the standard of review for facial challenges to court cost statutes grounded upon separation of powers, this Court cited to and quoted from *Peraza* in *Salinas*:

> The courts are delegated a power more properly attached to the executive branch if a statue turns the courts into "tax gathers," but the collection of fees in criminal cases is a part of the judicial function "if the statute under which court costs are assessed (or an interconnected statute) provides for an allocation of such costs to be expended for legitimate criminal justice purposes." What constitutes a legitimate criminal justice purpose is a question to be answered on a statute-by-statue/case-by-case basis. And the answer to that question is determined by what the governing statute says about the intended use of the funds, not whether funds are actually used for a criminal justice purpose.

Salinas v. State, 523 S.W.3d 103, 107 (Tex. Crim. App. 2017)

In *Salinas*, this Court found two court costs located within the Consolidated Court Cost fee, the "abused children's counseling" account and the "comprehensive rehabilitation" account, facially unconstitutional because they violated the separation of powers clause and were actually taxes unrelated to criminal justice purposes. *Salinas*, 523 S.W.3d at 108-110. This Court emphasized *Peraza* in making these determinations:

> The issue is whether the fee in question is a court cost (which is allowed) or a tax (which is unconstitutional). That issue must be determined at the time the fee is *collected*, not at the time the money is spent. Accordingly, *Peraza* requires that the relevant statutes direct that the funds be used for something that is a legitimate criminal justice purpose; it is not enough that some of the funds may ultimately benefit someone who has some connection with the criminal justice system. Under the dissents' (and the State's) reasoning, a fee to be paid for children's health insurance, without any other restriction, would be "for a criminal justice purpose" because someone who is a victim of a crime might receive medical services paid for by that insurance. Or a fee for the purpose of funding college student loans that would be available to anyone would be available to anyone would be "for a criminal justice purpose" because someone who was a victim of a crime (or a convict, for that matter) could apply for such a loan. Under such a view, there would be no limits to the types of fees the legislature could require the courts to collect, and courts would effectively be tax gathers.
>
> *Because the constitutional infirmity in this case is the statute's failure to direct the funds to be used in a manner that would make it a court cost (i.e., for something that is a criminal justice purpose), the statute operates unconstitutionally on its face. The fact that some of the money collected may ultimately be spent on something that would be a legitimate criminal justice purpose if the legislature had directed its use in that fashion is not sufficient to create a constitutional application of the statute because the actual spending of the money is not what makes a fee a court cost*.

Salinas, 103 S.W.3d at 109, fn. 26 (emphasis added)

"The Texas Constitution explicitly vests the judicial power of the state in the courts" *Armadillo*, 802 S.W.2d at 239, citing TEX. CONST. ART. V, § 1. "The core of this judicial power embraces the power (1) to hear evidence; (2) to decide the issues of fact raised by the pleadings; (3) to decide the relevant questions of law; (4) to enter a final judgment on the facts and the law; and (5) to execute the final judgment and sentence." *Id.* at 239-240, citing *Kelley v. State*, 676 S.W.2d 104, 107 (Tex. Crim. App. 1984). See also *Morrow v. Corbin*, 122 Tex. 553, 62 S.W.2d 641, 644 (Tex. 1933) ("Judicial power is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for a decision."). The judicial branch does not have the constitutional authority or power to tax.

The Comptroller of Public Accounts is one of six officers constituting the executive department of the State of Texas. TEX. CONST. ART. IV, § 1. The Comptroller is to perform such duties as may be required by law. TEX. CONST. ART. IV, § 23. One of those duties is the collection of taxes. See *e.g.* TEX. GOV'T CODE § 403.0142.[7] Because the Comptroller is an executive branch officer, the power to collect taxes resides in the executive branch of state government. Citing to the Texas Supreme Court's decision in *LeCrory*, the Texas Attorney General has explained that "court fees that are used for general purposes are characterized as taxes, and a tax imposed on a litigant interferes

[7] Chapter 403 of the Government Code sets out many of the Comptroller's duties in this regard.

with access to the courts in violation of the constitution." TEX. ATTY. GEN. OP. NO. JC-0158 (1999), citing *LeCrory v. Hanlon*, 713 S.W.2d 335, 341-343 (Tex. 1996).

The test articulated by this Court in *Peraza* and reaffirmed in *Salinas* was written in broad terms: "*if the statute under which court costs are assessed (or an interconnected statute) provides for an allocation of such court costs to be expended for legitimate criminal justice purposes, then the statute allows for a constitutional application that will not render the courts tax gathers in violation of the separation of powers clause*." *Peraza*, 467 S.W.3d at 517-518 (emphasis added). The collection of taxes is within the sole purview of the Executive Branch and nothing in the Texas Constitution allows the Judicial Branch to collect taxes. A court cost becomes a tax when it is not allocated to be expended for legitimate criminal justice purposes and simply raises revenue for non-criminal justice purposes. See *Peraza*, 467 S.W.3d at 517-518. This viewpoint is also consistent with the Texas Supreme Court's decision in *LeCrory*. [8] In order to determine whether or not the court cost is a tax, and thus

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[8] The fee statute at issue in *LeCrory* "direct[ed] $40 of a litigant's district court filing fee to go to state general revenues" in order to "generate revenue and to help finance state services." *LeCrory,* 713 S.W.2d at 336, 341. In holding that the fee violated the Texas Constitution's Open Court's provision, the Texas Supreme Court found that "[t]he major defect with the filing fee is that it is a general revenue tax on the right to litigate: the money goes to other statewide programs besides the judiciary." *Id.* The Court ultimately held:

> [T]hat filing fees that go to state general revenues – in other words taxes on the right to litigate that pay for other programs besides the judiciary – are unreasonable impositions on the state constitutional right of access to courts. Regardless of its size, such a filing fee is unconstitutional for filing fees go for non-court-related purposes.
>
> Filing fees and court costs are usually constitutional. Charging litigants that are able to pay a reasonable fee for judicial support services does not violate the open courts provision. Such fees interfere somewhat with access to the courts, but they are permitted because they go for court-related purposes.

unconstitutional, *Peraza* and *Salinas* direct us to look at what the statute (or an interconnected series of statutes) says about where the funds are to be allocated. This approach makes sense as this Court articulated in *Salinas:*

> *Peraza* requires that the relevant statutes direct that the funds be used for something that is a legitimate criminal justice purpose; it is not enough that some of the funds may ultimately benefit someone who has some connection with the criminal justice system. Under the dissents' (and the State's) reasoning, a fee to be paid for children's health insurance, without any other restriction, would be "for a criminal justice purpose" because someone who is a victim of a crime might receive medical services paid for by that insurance. Or a fee for the purpose of funding college student loans that would be available to anyone would be "for a criminal justice purpose" because someone who was a victim of a crime (or a convict, for that matter) could apply for such a loan. Under such a view, there would be no limits to the types of fees the legislature could require the courts to collect, and courts would effectively be tax gatherers.

Salinas, 523 S.W.3d at 109, fn. 26.

These same concerns were expressed by this Court in *Carson*, albeit within the framework that the statutorily proscribed court cost must be 'necessary' or 'incidental' to the 'trial of a criminal case.'" *Ex parte Carson*, 159 S.W.3d at 127. Other States have expressed these same concerns. *State v. Laclos*, 980 So. 2d 643, 651 (La. 2008) ("[O]ur clerks of court should not be made tax collectors for our state, nor should the threshold to our justice system be used as a toll booth to collect money for random programs created by the legislature."), *State v. Claborn*, 870 P.2d 169, 171 (Okla. Crim. App. 1994)

Id. at 342

(court cost not reasonably related to costs of administering criminal justice system renders courts "tax gatherers in violation of separation of powers"), and *People v. Barber*, 165 N.W.2d 608, 614 (Mich. 1968) ("[c]ourts are not tax gatherers."). The judiciary can collect court costs, but if those costs are not directed towards a legitimate criminal justice purpose, then those court costs become taxes as they are simply raising revenue. This theme is consistent throughout this Court's holdings in *Carson*, *Peraza*, and *Salinas*. Thus, the holdings in *Peraza* and *Salinas*, and to an extent the holding in *Carson*, are consistent with the "belief on the part of those who drafted and adopted our state constitution that one of the greatest threats to liberty is the accumulation of excessive power in a single branch of government." *Ex parte Lo*, 424 S.W.3d at 28.

C. The State's contention that historically most of the recouped money from court costs went into the State's general revenue fund where it could be used for any purpose does not sanction a violation of the Separation of Powers clause of the Texas Constitution.

The State contends "[t]he court-cost scheme in effect when the Texas constitution was adopted required convicted defendants to pay virtually the entire cost of their prosecution. Much of this recouped money went into the state's general fund where it could be used for any purpose. This scheme was in place for decades prior to the adoption of the current constitution, and lasted until the major statutory revision of 1965" and "this Court's recent focus on where court-cots are directed is not consistent with the original under of the Texas Constitution." (State's Brief at 11-12, 30-37).

As stated above, Appellant contends that this Court's recent court costs cases are consistent with the interpretation of the Separation of Powers clause throughout the history of Texas jurisprudence. Furthermore, this Court has noted that "the usurpation of power will not receive sanction by reason of a long and unprotested continuation." *Meshell*, 739 S.W.2d at 252, fn. 8 (speedy trial act declared unconstitutional as a violation of separation of powers "nearly ten years after the promulgation of the Act"), citing *Rochelle*, 148 S.W. at 560 ("it should be known in Texas that a disregard of the Constitution by the usurpation of power on the part of officials is not sanctified by its long continuance, and that each officer confine his acts to the limits of his power."). See also *I.N.S. v. Chada*, 462 U.S. 919 (1983) (declaring Immigration and Nationality Act, § 244(c)(2), unconstitutional some 32 years after passage of original bill) and *Northern Pipeline Constr. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (declaring Bankruptcy Reform Act of 1978 unconstitutional four years after effective date). Although the summoning witness/mileage fee had yet to face a constitutional challenge during its existence, that fact in-of-itself doesn't mean that the statute would survive scrutiny under the Separation of Power clause.

D. The State fails to consider the critical legal distinction between fines and court costs when it asks "[i]f three out of four court proceedings in Texas consist of nothing more than assessing and collecting fines for general revenue, how does it turn courts into non-judicial 'tax gathers' to assess court costs that may go to general revenue."

The State contends that "[t]his Court's concerns with becoming a 'tax gatherer' conflicts with the essential role Texas courts play in funding local government through

fine collection." (State's Brief at 41- 43). The State also places a particular emphasis on the amount of Class C misdemeanors that are filed in comparison to other criminal cases where incarceration is an option, and more specifically contends:

> For both "fines" and "costs," the amounts are determined by statute. In both instances, only convicted defendants pay. Does attaching two different names to the same act – making those found guilty in court pay legislatively prescribed, if variable, amounts for the harm they have caused – render them so distinct that one is a judicial function and the other an executive act? Are the acts *so* distinct that they cannot be performed by the same branch of government? The State is not aware of any case law explaining why this would be so.

(State's Brief at 41-43).[9]

The State's questions are founded upon a faulty premise that this Court has expressly rejected: that court costs and fines are both legislative prescribed amounts for the harm they have caused. "[C]ourt costs are compensatory in nature; that is, they are a 'nonpunitive recoupment of the costs of judicial resources expended in connection with the trial of the case.'" *Armstrong v. State*, 340 S.W.3d 759, 767 (Tex. Crim. App. 2011), quoting *Weir v. State*, 278 S.W.3d 364, 366 (Tex. Crim. App. 2009) (quotations omitted). In *Weir*, this Court held that "court costs are not punitive and, therefore, did

[9] Justice Courts "shall have original jurisdiction in criminal matters of misdemeanor cases punishable by fine only, exclusive in civil matters where the amount in controversy is two hundred dollars or less, and such other jurisdiction as may be provided by law." TEX. CONST. ART. V, Sec. 19. See also TEX. CODE OF CRIM. PROC. ART. 4.11. Municipal Court have "concurrent jurisdiction with the justice court of a precinct in which the municipality is located in all criminal cases arising under state law that arise within the municipality's territorial limits or property owned by the municipality located in the municipality's extraterritorial jurisdiction and that: (1) are punishable by fine only." TEX. GOV'T CODE § 29.003(b)(1) and (c). See also TEX. CODE OF CRIM. PROC. ART. 4.14. A Class C Misdemeanor "shall be punished by a fine not to exceed $500." TEX. PEN. CODE § 12.23.

not have to be included in the oral pronouncement of sentence…as a precondition to their inclusion in the trial court's written judgment." *Weir*, 278 S.W.3d at 367. In support of that holding, this Court believed "it [was] relevant that the legislature ha[d] not treated court costs like it has the fines imposed pursuant to Chapter 12 of the Texas Penal Code, which is entitled 'Punishments.'" *Weir*, 278 S.W.3d at 366. "Unlike court costs imposed under Section 102.021 of the Texas Government Code, which is entitled 'Court Costs on Conviction,' fines imposed under Chapter 12 of the Texas Penal Code are labeled 'fines' by the Legislature and are clearly punitive in nature." *Id.*[10] See also *Armstrong*, 340 S.W.3d at 767 ("Fine are punitive, and they are intended to be part of the convicted defendant's sentence as they are imposed pursuant to Chapter 12 of the Texas Penal Code, which is entitled 'Punishments.'). In *Weir*, this Court also distinguished court costs from restitution, which is also punitive: "Unlike court costs imposed under Section 102.021 of the Texas Government Code, the statute in the Code of Criminal Procedure authorizing restitution, Article 42.037(A), TEX. CODE OF CRIM. PROC., provides that a trial court may order the convicted defendant to make restitution necessary victim of the offense 'in addition to any fine authorized by law.'" *Weir*, 278 S.W.3d at 366. Finally, this Court declined to construe Article 42.15 of the Texas Code of Criminal Procedure as an "indication that the Legislature has intended to treat fines

[10] The court cost at issue in this case, the summoning witness/mileage fee, is included within Section 102.021 of the Texas Government Code. See TEX. GOV'T CODE § 102.021(3)(C) and (I).

and costs similarly for sentencing purposes" and instead construed Article 42.15 "as treating fines and costs similarly only in terms of where they are to be paid." *Id.* at 366, fn. 5.[11] As the Texas Supreme Court held more than a century ago, "[i]n criminal law, [a fine] is a pecuniary punishment imposed by the judgment of a court upon a person convicted of crime." *State v. Steen*, 14 Tex. 396, 398 (Tex. 1855). Thus, the critical distinction between a fine and a court cost is that the former is a punitive measure designed to punish a particular defendant and the latter is not designed to punish a defendant, but to recoup some judicial cost that was expended in connection with the criminal case.

Unlike a county court or a district court, the only possible punishment is a fine in a justice or municipal court. The money collected as a result of that fine is "a pecuniary punishment imposed by the judgment of a court upon a person convicted of a crime." *Id.* "It is imposed as a punishment solely, and its payment, as the term imports, is an end of the punishment." *Id.* "[I]n any case where a fine constitutes the sole punishment of a party its payment puts an end to the offense for which it was imposed, or to the legal liability growing out of such offense." *Id.* This is not the same as a court cost that is designed to recoup "judicial resources expended in connection with the trial of the case" and not be used to further punish a particular defendant. *Armstrong*, 340

[11] Article 42.15 of the Texas Code of Criminal Procedure provides in pertinent part: "When the defendant is fines, the judgment shall be that the defendant pay the amount of the fine and all costs to the state." TEX. CODE OF CRIM. PROC. ART. 42.15(a).

S.W.3d at 767. "Court fees that are used for general purposes are characterized as a tax imposed on a litigant…violat[es]…the Constitution." *Allen v. State*, No. 01-16-00768-CR, 2018 Tex. App. LEXIS 7216 at * 47 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018, pet. granted) (op. on reh'g) (Jennings, J., dissenting). See also *LeCroy*, 713 S.W.2d at 341-343 ("[t]he major defect with the filing fee is that it is a general revenue tax on the right to litigate: the money goes to other statewide programs besides the judiciary."). This distinction between the purposes of a fine and a court cost is a critical distinction that the State overlooks.

The State's argument also overlooks that justice and municipal courts also collect court costs from defendants convicted in their courts. For example, just as defendants who are convicted of a felony or misdemeanor offense in district or county court, a person convicted of a criminal offense in a justice or municipal court must pay a Consolidated Court Cost. See TEX. LOCAL GOV'T CODE §133.102(a) ("A person convicted of an offense shall pay as a court cost, in addition to all other costs…$40 on conviction of a nonjailable misdemeanor offense, including a criminal violation of a municipal ordinance, other than a conviction of an offense relating to a pedestrian or the parking of a motor vehicle."). Other court costs that a defendant must pay if they are convicted of a Class C misdemeanor include a $6 Judicial Support Fee and a $2 Indigent Defense Fee. See TEX. LOCAL GOV'T CODE §§ 133.105(a) and 133.107. Even the summoning witness/mileage fee under TEX. CODE OF CRIM. PROC. ART. 102.011(a)

and (b) may be assessed against a criminal defendant convicted of a Class C misdemeanor if those services were performed.

In sum, the State's contentions overlook the critical distinction between a fine and a court cost; one is punitive, the other is not. Furthermore, this distinction is also illustrated by the fact that court costs are collected in cases in which a person is convicted of an offense only punishable by a fine. Finally, this distinction answers the State's question regarding the differences between a fine and court cost that they posed in their brief.

E. The State's proposed rule would in fact turn the judiciary into tax gatherers regardless of whether or not the judiciary made a profit off of the criminal defendant as the judiciary would still be engaged in the collection of court costs directed to fund programs that have nothing to do with the criminal justice system.

In their brief, the State's proposes a new rule for court costs: "[s]o long as court costs do not exceed the amount the government actually spent on the trial, courts do not become tax gatherers in violation of the separation of powers clause, but are instead merely allowing the government to recoup its expenses." (State's Brief at 44). Throughout their proposed rule, the State emphasizes that this rule would not lead to the State turning a profit off of a criminal defendant. Thus, the State believes that their proposed rule would survive constitutional scrutiny even though it acknowledges that calculating the State's cost in prosecuting a criminal defendant is nearly impossible to calculate and the rule would rely upon the Legislature's low-ball estimation regarding the costs associated with a criminal trial. (State's Brief at 44-58). Appellant contends

that while the State's rule focuses on the Judiciary not being a profit center, it forgets that a court cost becomes a tax when it is collected under the guise of being a reimbursement for the expenses of a criminal prosecution, but directed to fund programs that have nothing to do with the criminal justice system. Or as this Court has stated "not a legitimate criminal justice purpose."

In one example, the State asks this Court to consider a hypothetical in which a $25 prosecutor's fee is assessed with the difference being in one hypothetical the money is allocated to the general fund and used to fix potholes and in the other example, the Comptroller would sent the money directly to the highway fund to fix potholes. (State's Brief at 46). According to the State, the court collects the same money from the same person for the same reason and it goes to the same use. The only difference is whether the Legislature that created the fee gets to determine where it goes, or whether a future Legislature gets to spend the money." (State's Brief at 49). Appellant agrees that the Legislature has the power to tax. See *Thompson v. State*, 17 Tex. Ct. App. 253, 256 (1884) ("The taxing power must be left to that part of the government which is to exercise it, that is, the Legislature."). However, the State's example overlooks the fact that the power to collect a tax is entrusted to the Comptroller's officer, an executive agency, not the judiciary. The Constitutional infirmity is the Judicial Branch's collection of a court cost that is not allocated for *a legitimate criminal justice purpose* in both examples. Using court costs to raise money to items that are not for a legitimate criminal justice purpose, such as potholes, would open the floodgates as to what the Legislature could come up

with for criminal defendants to fund. If a new highway is needed and the Legislature does not want to create or raise a new tax that would probably not be very popular with the populace, call it a "court cost" and collect the money from criminal defendants, whom the State acknowledges are not usually very wealthy. The concern that this Court and other State courts have expressed would come to fruition under the State's proposed rule. See *Ex parte Carson*, 159 S.W.3d at 127; *LeCrory*, 713 S.W.2d at 341-343; *State v. Laclos*, 980 So. 2d 643, 651 (La. 2008); *State v. Claborn*, 870 P.2d 169, 171 (Okla. Crim. App. 1994); and *People v. Barber*, 165 N.W.2d 608, 614 (Mich. 1968).

In another example the State uses a hypothetical case where the State spent $1000.00 on the case and only assessed court costs totaling $170.00. (State's Brief at 48-49). According to the State, "[b]cecause the costs are less than expenses, the court is not gathering taxes but instead ordering a losing party to reimburse part of a prevailing party's expenses and then allowing the prevailing party to spend the money as it sees fit." (State's Brief at 48). Furthermore, the State attempts to extrapolate the amount of money could have been raised through the consolidated court cost under TEX. GOV'T CODE § 133.101 and compares this estimated figure to the budget of the Harris County District Attorney's Office to support its contention that the Judiciary is not turning a profit with court costs. (State's Brief at 53-54). According to the State, the estimated amount collected from this court cost from offenses subject to imprisonment would only cover 56% of the budget. (State's Brief at 54). Addressing the State's estimation first, the State acknowledged earlier in its brief that the Consolidated Court cost is

applicable to Class C misdemeanors and there were 6,659,919 Class C misdemeanors filed. However, they did not include the estimated court cost from Class C misdemeanors in their estimations. For a Class C misdemeanor, this court costs would be $40. See TEX. LOCAL GOV'T CODE §133.102(a). If even half of those Class C misdemeanors resulted in a criminal conviction, the court cost would yield over 120 million dollars. Appellant also notes that the consolidated court cost is one court cost among many that a criminal defendant has to pay upon conviction.

The State also acknowledges that "[a]ny rule that looks at the amount of court costs assessed in particular cases must take into account that it is practically impossible to know the precise costs of any individual prosecution." (State's Brief at 50). However, to overcome this difficulty, the State argues that "there must be some estimation" and the Legislature has made this estimation with low-ball figures "that does not risk turning criminal trials into profit centers." (State's Brief at 50).[12]

Appellant agrees with the State "that criminal trials should not be profit centers." (State's Brief at 54). However, whether or not the judiciary makes a "profit" is not the issue in determining whether the judiciary becomes a "tax gatherer" in violation of the

[12] Considering the inherent difficulties with calculating the costs associated to the State in a criminal prosecution, particularly given the complexities of each individual case, one would assume that any estimation of a particular court cost would be a low-ball estimate in order for it to be applied equally amongst all criminal defendants. Beyond a general deference to Legislative estimates, the State never proposes how in fact the Legislature would even determine the costs of a criminal trial. If the constitutionality of the State's rule is dependent on the Judiciary not making a profit, then at least some baseline would appear to be needed or the rule would seem to be unworkable regardless of whom determines the estimated court costs.

Separation of Powers clause. A court cost becomes a tax when it is collected under the guise of being a reimbursement for the expenses of a criminal prosecution, but directed to fund programs that have nothing to do with the criminal justice system. Under the State's proposed rule, the judiciary is still collecting revenue from criminal defendants that would not be directed to a legitimate criminal justice purpose. Whether it is $5.00 or $500.00, the act is still the same, the judiciary has becoming "tax gatherers" in violation of the Separation of Powers clause of the Texas Constitution. Again, Appellant contends that this Court in *Carson* was motivated by the concern that court costs not "necessary" or "incidental" to a criminal trial would be a "tax" being charged on criminal defendant to fund expenses not related to a criminal trial. *Ex parte Carson*, 159 S.W.2d at 127. This concern has continued through this Court's recent decisions in *Peraza* and *Salinas*, albeit with court costs now evaluated under a more relaxed framework than under *Carson*. See *Salinas*, 523 S.W.3d at 109, fn. 26. The Texas Supreme Court has expressed similar concerns in the context of filing fees for civil cases. *LeCrory*, 713 S.W.2d at 341-343.

Finally, the State contends that "the *Peraza-Salinas* rule could be easily abused to turn criminal trials into profit centers," using an example of a prosecutor's fee of $5000.00 in all cases, so long as the "fee was directed to the salary funds of prosecutors in order to satisfy the *Peraza-Salinas* rule." (State's Brief at 56-57). Although such a situation is purely hypothetical, Appellant believes that such a high court cost would be susceptible to an attack as possibly being punitive and potentially grossly-

disproportionate to the gravity of the offense or service utilized by the court. See *Timbs v. Indiana*, 203 L. Ed. 2d 11, 2019 U.S. LEXIS 1350 (Feb. 20, 2019). In other words, a court cost of $5,000 would potentially open itself to being attacked on the grounds that this "court cost" is not designed to reimburse the criminal justice system, but to further punish the criminal defendant.

F. Conclusion

The Separation of Powers clause contemplates a zone of power for each department that must be kept free of usurpation or undue influence by each other department. This is the consistent theme throughout Texas Jurisprudence in interpreting the Separation of Powers clause of the Texas Constitution. The test articulated by this Court in *Peraza* and reaffirmed in *Salinas* was written in broad terms: "*if the statute under which court costs are assessed (or an interconnected statute) provides for an allocation of such court costs to be expended for legitimate criminal justice purposes, then the statute allows for a constitutional application that will not render the courts tax gathers in violation of the separation of powers clause.*" *Peraza*, 467 S.W.3d at 517-518 (emphasis added). Although this Court has rejected the requirement that a court cost must be "necessary" or "incidental" to the trial of a criminal case, the belief in implicit in *Carson* that if court costs were collected by the judiciary were not for a legitimate criminal justice purpose and the concerns expressed by this Court of these types of court costs becoming a method raising revenue remain true today. This theme is further expressed in this Court's decisions in *Peraza* and *Salinas*.

The collection of taxes is within the sole purview of the Executive Branch and nothing in the Texas Constitution allows the Judicial Branch to collect taxes. A court cost becomes a tax when it is not allocated to be expended for legitimate criminal justice purposes. See *Peraza*, 467 S.W.3d at 517-518. This viewpoint is also consistent with the Texas Supreme Court's decision in *LeCroy*. In order to determine whether or not the court cost is a tax, and thus unconstitutional, *Peraza* and *Salinas* direct us to look at what the statute (or an interconnected series of statutes) says about where the funds are to be allocated to, an approach that makes sense. Thus, the holdings in *Peraza* and *Salinas*, and to an extent the holding in *Carson*, are consistent with the "belief on the part of those who drafted and adopted our state constitution that one of the greatest threats to liberty is the accumulation of excessive power in a single branch of government." *Ex parte Lo*, 424 S.W.3d at 28.

Finally, the State's proposed rule would use court costs to raise money to items that are not for a legitimate criminal justice purpose, such as potholes, and would open the floodgates as to what the Legislature could come up with for criminal defendants to fund under the guise of paying "court costs." This is the concern that this Court and other State courts have expressed and this concern would come to fruition under the State's proposed rule. Whether or not the Judiciary makes a "profit" is not the issue in determining whether the Judiciary becomes a "tax gatherer" in violation of the Separation of Powers clause. A court cost becomes a tax when it is collected under the guise of being a reimbursement for the expenses of a criminal prosecution, but used to

raise revenue and direct funds to programs that have nothing to do with the criminal justice system.

PRAYER

Appellant, Ruben Lee Allen, prays that this Court dismiss the State's Cross-Petition for Discretionary Review as improvidently granted. Alternatively, Appellant prays for this Court to reverse the First Court of Appeals' judgment, declare the summoning witness/mileage fee facially unconstitutional in violation of the Separation of Powers clause under the Texas Constitution, and modify the trial court's judgment to delete the $200.00 fee from the bill of costs. Appellant also prays for such other relief that this Court may deem appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of Appellant's Brief Regarding the State's Cross-Petition for Discretionary Review was served on Clint Morgan of the Harris County District Attorney's Office and Stacey Soule of the Office of State Prosecuting Attorney on March 12, 2019 to the email addresses on file with the Texas e-filing system.

/s/ Nicholas Mensch
Nicholas Mensch

CERTIFICATE OF COMPLIANCE

In accordance with Texas Rule of Appellate Procedure 9.4, I certify that this computer-generated document complies with the typeface requirements of Rule 9.4(e). This document also complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i) because this petition contains 11,152 words (excluding the items exempted in Rule 9.4(i)(1)).

/s/ Nicholas Mensch
Nicholas Mensch